

**FILED**

NOV 07 2005

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA**

U.S. BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA

In re: ) Chapter 13  
ELIZABETH J. BLACKWELL, ) No. 4:05-bk-02534-JMM  
)  
) **MEMORANDUM DECISION**  
)  
) (Opinion to be Posted)  
\_\_\_\_\_  
Debtor. )

On May 13, 2005, Janice Bernardini, Guardian and Conservator of the Estate of Jean M. Blackwell, filed a Motion to Dismiss Debtor's Chapter 13. This court allowed a short hearing to enable Conservator to present evidence, with the immediate objective to determine whether she could prove that her claim was in a sufficient amount to put Debtor over the debt limitations. The hearing on amount of Conservator's claim was held September 26, 2005. The court then took the matter under advisement. After reviewing the arguments and the law, this court now rules.

**JURISDICTION**

This court has jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b). Venue is proper in this Court pursuant to 28 U.S.C. § 1409.

**PROCEDURALFACTS**

Elizabeth Blackwell ("Debtor") filed a Chapter 13 bankruptcy petition on May 9, 2005. Janice Bernardini, Conservator of the Estate of Jean McKee Blackwell ("Conservator") and Steven Phillips, Trustee of the Jean McKee Blackwell Family Trust ("Trustee") filed a Motion to Dismiss, arguing that

1 Debtor did not qualify for Chapter 13 because her debts exceeded the debt limits set out in § 109(e).

2 Conservator and Trustee filed a pre-petition action in Pima County Superior Court against Debtor,  
3 alleging individual liability of a de facto conservator, constructive fraud/breach of fiduciary duty,  
4 financial exploitation of a vulnerable adult, conversion, unjust enrichment and accounting. In sum, these  
5 claims allege that Debtor is liable for the dissipation of assets belonging to Jean Blackwell, her former  
6 mother-in-law, to which she had access and which she spent for her benefit or for the benefit of her  
7 family, or otherwise failed to manage as a reasonable person would manage the assets of another. The  
8 damages alleged by Conservator and Trustee total over \$11.5 million. Before that case could come to  
9 trial, Debtor filed Chapter 13.

10 Debtor's Schedule F lists \$122,320.00 in general unsecured debt. The lawsuit filed by  
11 Conservator and Trustee is listed in Debtor's Schedule F as unliquidated and disputed; and the amount  
12 of the claim is listed as "unknown." Debtor's Schedules include a supplement to Schedule F, which  
13 explains why Debtor believes the claim of Conservator and Trustee is disputed and unliquidated.

14 A hearing was held on Conservator and Trustee's Motion to Dismiss on July 6, 2005. At that  
15 time, this court took the matter under advisement and subsequently allowed Conservator to present  
16 evidence in order to prove that her claim was in a sufficient amount so as to put Debtor over the debt  
17 limitations set forth under § 109(e).

18 On September 26, 2005, this court held a hearing and took evidence on amount of Conservator's  
19 claim. The matter was taken under advisement.

20  
21 **ISSUE**  
22

23 Whether Debtor's noncontingent, liquidated, unsecured debt is sufficiently ascertainable so as  
24 to put her over the chapter 13 debt limits, pursuant to § 109(e)?  
25  
26

1 DISCUSSION

2  
3 Eligibility for chapter 13 is established under § 109(e), which provides that, at the time of  
4 Debtor's petition:

5 Only an individual with regular income that owes, on the date of the filing of  
6 the petition, noncontingent, liquidated, unsecured debts of less than \$307,675 and  
7 noncontingent, liquidated, secured debts of less than \$922,975 . . . may be a debtor  
8 under chapter 13 of this title.

9 11 U.S.C. § 109(e).

10 Only contingent or unliquidated debt are excluded from the § 109(e) eligibility computation;  
11 disputed debts are not excluded unless they can be excluded on one of the other grounds. *See*  
12 *Sylvester v. Dow Jones & Co. (In re Sylvester)*, 19 B.R. 671, 673 (9th Cir. 1981).

13 Debtor's original Schedule F indicated a total of \$122,320.00 in noncontingent, liquidated,  
14 unsecured debt. Although Debtor listed Conservator's claim on that same schedule, she designated it  
15 as an unliquidated and disputed debt of an "unknown" amount.

16 Conservator contends that her claim is noncontingent because all events giving rise to liability  
17 occurred prior to the filing of the bankruptcy petition. In addition, Conservator contends that her  
18 claim is liquidated because Conservator can present a small amount of evidence in order to readily  
19 ascertain the amount of the claim.

20 In the Ninth Circuit, chapter 13 "eligibility should normally be determined by the debtor's  
21 originally filed schedules, checking only to see if the schedules were made in good faith." *Scovis v.*  
22 *Henrichsen (In re Scovis)*, 249 F.3d 975, 982 (9th Cir. 2001). However, Debtor's schedules are not  
23 dispositive. "A bankruptcy court should 'look past the schedules to other evidence submitted when a  
24 good faith objection to the debtor's eligibility has been brought by a party in interest.'" *In re*  
25 *Quintana*, 107 B.R. 234, 239 n.6 (9th Cir. BAP 1989), quoting *In re Williams Land Co.*, 91 B.R. 923,  
26 927 (Bankr.D. Or. 1988).

Therefore, this court must look at the evidence presented by Conservator in support of her

1 claim in order to determine whether Debtor, in good faith, listed the claim as contingent and  
2 unliquidated, and thus was eligible for chapter 13.

3  
4 **1. Conservator's Claim is Noncontingent**

5  
6 It is well settled in the Ninth Circuit that "a debt is noncontingent if all events giving rise to  
7 liability occurred prior to the filing of the bankruptcy petition." *Nicholes v. Johnny Appleseed of*  
8 *Washington (In re Nicholes)*, 184 B.R. 82, 88 (9th Cir. BAP 1995), citing *In re Fostvedt*, 823 F.2d  
9 305, 306 (9th Cir. 1987). The Ninth Circuit stated:

10 [T]he rule is clear that a contingent debt is "one which the debtor will be called upon  
11 to pay only upon the occurrence or happening of an extrinsic event which will trigger  
the liability of the debtor to the alleged creditor."

12 *Fostvedt*, 823 F.2d at 306, quoting *Brockenbrough v. Commissioner*, 61 B.R. 685, 686  
13 (Bankr.W.D.Va. 1986). "[T]he fact that a claim has not been reduced to judgment does not render it  
14 contingent." *Nicholes*, 184 B.R. at 88, citing *In re Dill*, 30 B.R. 546, 549 (9th Cir. BAP 1983), *aff'd*  
15 731 F.2d 629 (9th Cir. 1984).

16 Conservator contends that her claim is noncontingent because all events giving rise to liability  
17 occurred prior to the filing of the bankruptcy petition. Conservator is correct.

18 A tort claim ordinarily is not contingent as to liability; the events that give rise to the  
19 tort claim usually have occurred and liability is not dependent on some future event  
20 that may never happen. It is immaterial that the tort claim is not adjudicated or  
characteristics of claims under the Code.

21 *In re Loya*, 123 B.R. 338, 340 (9th Cir. BAP 1991). Because Jean Blackwell's money has already  
22 been spent by Debtor, all events giving rise to liability (the conversion of Jean Blackwell's assets by  
23 Debtor) occurred pre-petition. It is immaterial that Conservator's claims have not yet been  
24 adjudicated or that Debtor disputes Conservator's claims. Thus, Conservator's claims meet the legal  
25 standards, and are therefore noncontingent.  
26

1                   **2. Conservator's Claim is Liquidated**

2  
3                   A bankruptcy court must determine the liquidated amount of any disputed claim prior to  
4 making the § 109(e) computation. *Sylvester*, 19 B.R. at 673. A debt that is “readily ascertainable” is  
5 liquidated for the eligibility determination. *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 873 (9th Cir. BAP  
6 2002).

7                   The Ninth Circuit affirmed and adopted the BAP’s definition of what is readily ascertainable:  
8

9                   The definition of “ready determination” turns on the distinction between a simple  
10 hearing to determine the amount of a certain debt, and an extensive and contested  
11 evidentiary hearing in which substantial evidence may be necessary to establish  
12 amounts or liability. On this issue, the bankruptcy judge has the best occasions to  
13 determine whether a claim will require an overly extensive hearing or whether the  
14 claim is subject to a bona fide dispute; therefore not subject to “ready determination.”

15 *FDIC v. Wenberg (In re Wenberg)*, 94 B.R. 631, 634-35 (9th Cir. BAP 1988).

16                   Conservator contends that her claim is liquidated because Conservator need present only a  
17 small amount of evidence in order to readily ascertain the amount of the claim. Conservator was  
18 given the opportunity to present this evidence at the September 26, 2005 hearing. At the hearing,  
19 Conservator argued that she need only present a small amount of evidence and then the burden shifted  
20 to Debtor. Debtor did not appear at the hearing, nor did Debtor present any evidence or provide any  
21 witness to controvert her assertion that she did not convert Jean Blackwell’s money.

22                   A.R.S. § 46-456 provides that “[a] person who is in a position of trust and confidence to an  
23 incapacitated or vulnerable adult shall act for the benefit of that person to the same extent as a trustee  
24 . . . .” Under Arizona law, a fiduciary relationship exists between a trustee and the beneficiary. *In re*  
25 *Naarden Trust*, 195 Ariz. 526, 529, 990 P.2d 1085, 1088 (App. 1999).

26                   Conservator presented evidence to prove that Debtor was a person in a position of trust and  
confidence to Jean Blackwell, an incapacitated or vulnerable adult. Conservator presented sufficient  
evidence to show that Debtor “was acting as Jean Blackwell’s de facto conservator, and that Jean

1 Blackwell trusted and was reliant on Elizabeth Blackwell for the management of her household  
2 finances.” Declaration of Steven W. Phillips, September 15, 2005, ¶ 8. Conservator also proved that  
3 Jean Blackwell was an incapacitated or vulnerable adult. See Declaration of Steven W. Phillips,  
4 September 15, 2005, ¶ 12 (“Jean was very unaware of her circumstances and her assets in general”), ¶  
5 13 (“[I]t is clear to me that she [Jean Blackwell] is unable to manage her affairs or her finances”).

6       Once a fiduciary relationship is established, the law presumes that any transaction between the  
7 parties in which the dominant party has profited is fraudulent and that such presumption may be  
8 rebutted only by clear and convincing proof. *Al-Abood ex rel. Al-Abood v. El-Shamari*, 217 F.3d 225  
9 (4th Cir. 2000). Conservator presented evidence of a multitude of transactions in which Debtor and  
10 her family profited. Debtor used Jean Blackwell’s credit cards and bank accounts to purchase tack,  
11 clothes, and travel, among other items and expenses for herself and her family. Since Debtor and her  
12 family profited from these transactions, the law presumes these transactions to be fraudulent.

13       The burden then shifts to the fiduciary, here the Debtor, to prove, by clear and convincing  
14 evidence, that no breach of fiduciary duty occurred. *GAB Business Services, Inc. v. Lindsey &*  
15 *Newsom Claim Services, Inc.*, 83 Cal. App. 4th 409, 99 Cal. Rptr. 2d 665 (4th Dist. 2000), as  
16 modified, (Sept. 14, 2000) and as modified on denial of reh’g, (Sept. 26, 2000) and review denied,  
17 (Dec. 13, 2000). A fiduciary may rebut the presumption of fraud or undue influence by clear and  
18 convincing proof that she has exercised good faith and has not betrayed the principal’s confidence.  
19 *CSFM Corp. v. Elbert & McKee Co.*, 870 F.Supp. 819 (N.D. Ill. 1994). To meet that burden, the  
20 fiduciary must show full disclosure of all relevant information to the subservient party, adequate  
21 consideration, and competent and independent advice to the principal before completing the  
22 transaction. *Id.* As stated above, Debtor did not appear at the hearing and no evidence was presented  
23 on her behalf to prove that the transactions were not fraudulent. Thus, Debtor was unable to rebut the  
24 presumption of liability to the Conservator.

25       Because Debtor failed to offer any evidence toward establishing that no breach of fiduciary  
26

1 duty occurred, the presumption of fraud has not been rebutted. Conservator presented sufficient  
2 evidence, which was not rebutted by Debtor, for the following claims:

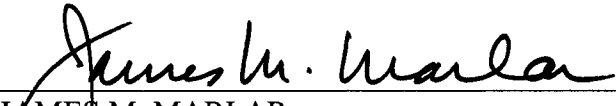
ACCOUNT	AMOUNT OF CHARGES/DEBT	TOTAL CLAIM FOR DAMAGES
American Express	\$150,623.55	\$118,458.27
Citibank	\$176,764.55	\$153,544.07
Bank of America	\$240,164.43	\$231,810.77
Bank One Account (Grampian Sales Proceeds)	\$589,364.02	\$589,364.02
Motorhome Debt	\$92,420.12	\$92,420.12
<b>TOTAL</b>	<b>\$1,249,336.67</b>	<b>\$1,185,597.25</b>

11 Conservator's claim is therefore readily ascertainable and thus liquidated in the amount of, at  
12 the very least, \$1,185,597.25. Because § 109(e) limits noncontingent, liquidated, unsecured debts to  
13 less than \$307,675 and because Conservator holds a noncontingent, liquidated, unsecured claim in the  
14 amount of \$1,185,597.25, Debtor is ineligible to be a debtor under Chapter 13.

### 16 CONCLUSION

17  
18 Because Debtor's noncontingent, liquidated, unsecured debt puts her over the Chapter 13 debt  
19 limits pursuant to § 109(e), she is ineligible to be a debtor under Chapter 13. Debtor's Chapter 13 is  
20 therefore dismissed with prejudice. A separate order will be entered simultaneously with this  
21 Memorandum Decision.  
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1  
2 DATED: November 7<sup>th</sup>, 2005.

3  
4  
5   
6 JAMES M. MARLAR  
UNITED STATES BANKRUPTCY JUDGE

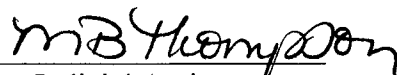
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